IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-903

PATRICK MYERS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT)

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
MELBOURNE A. NOEL, JR.,
Assistant Attorney General,
188 West Randolph Street (Suite 2200),
Chicago, Illinois 60601,
312/793-2570,
Attorneys for Respondent.

THOMAS CONNORS,
Assistant Attorney General,
Of Counsel.

Keenan Printing Company 312-648-0050 — 365

TABLE OF CONTENTS

AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-903

PATRICK MYERS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT)

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED FOR REVIEW

Whether the Illinois Supreme Court order that petitioner asks this Court to review—which order remands a case for trial—is a final judgment within the meaning of 28 U.S.C., Sec. 1257.

ARGUMENT

THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE ILLINOIS SUPREME COURT ORDER THAT PETITIONER ASKS THIS COURT TO REVIEW IS NOT A "FINAL JUDGMENT" WITHIN THE MEANING OF THE APPLICABLE JURISDICTIONAL STATUTE.

Petitioner Myers asks this Court to review an Illinois Supreme Court order that overturns an Illinois Appellate Court ruling and remands the case for trial to the Circuit Court of Cook County (see Petition, at 23a). The procedural effect of the order that petitioner asks this Court to review is to deny the petitioner's motion to suppress evidence on Fourth Amendment grounds and to make the case ripe for trial on the question of guilt or innocence. The Illinois Supreme Court's order, therefore, is not a "final judgment" within the meaning of 28 U.S.C., Sec. 1257, the jurisdictional statute under which petitioner asks this Court to act (see Petition, at 2). This Court, accordingly, should not grant certiorari.

In this case, petitioner moved in the trial court for an order suppressing certain tangible evidence. The motion was granted, and the suppression order entered. This order of the trial court is appealable under Illinois law, see Illinois Supreme Court Rule 604(a)(1), *Ill. Rev. Stat.*, Ch. 110A, Sec. 604(a)(1), and the State of Illinois duly appealed the trial court's order. The Illinois Appellate Court, to which the appeal was taken, affirmed the suppression order. The Illinois Supreme Court later reversed this Appellate Court ruling and entered the remand order that petitioner asks this Court to review here.

Under the present posture of the case, then, petitioner is to be tried on the merits of the charge of possession of marijuana, see *Ill. Rev. Stat.*, Ch. 57½, Sec. 704. And the case is in fact pending at this time in the Circuit Court of Cook County, Illinois. Yet petitioner has asked this Court to render what would amount to an advisory opinion on the question whether the Illinois Supreme Court's ruling on the Fourth Amendment question conflicts with this Court's holding in *United States* v. *Chadwick*, __ U.S. __, 97 S. Ct. 2476 (1977).

On somewhat similar facts, this Court, in *Gospel Army* v. *City of Los Angeles*, 331 U.S. 543, 67 S. Ct. 1428 (1947), denied certiorari of a California Supreme Court order that remanded a case " 'for a new trial and place[d] the parties in the same position as if the case had never been tried,' " 67 S. Ct., at 1430. The same reasoning applies *a fortiori* in this case, which has never been tried on the merits in a state court. Petitioner might well be acquitted in the Illinois court of the charge of possession of marijuana, and yet he is asking this Court to apply a major Fourth Amendment precedent—the rule of *Chadwick*—to a factual context that has not yet resulted, and may never result, in a criminal conviction. On these facts, the Court, by granting certiorari, would be rendering an advisory opinion of the most extreme sort.

This Court has made it explicitly clear that the rule against advisory opinions is what lies behind the Congressional mandate that the Court's certiorari jurisdiction extends only to final judgments. In *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 73 S. Ct. 749 (1953), the Court said:

> Congress has limited our power to review judgments from state courts lest the Court's jurisdiction be exercised in piecemeal proceedings to render advisory opinions. Were our reviewing power not limited to 'final' judgments, litigants would be free to come here and seek a decision on federal questions which, after later proceedings, might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation. Ordinarily, then, the overruling of a demurrer, like the issuance of a temporary injunction, is not a 'final judgment.' [73 S. Ct., at 750-51].

The concerns voiced by the *Pope* Court could very well be realized in this case if the Court were to grant certiorari, since the case—after some ruling by this Court on *Chadwick* grounds—might be susceptible to disposition on some ground entirely distinct from *Chadwick* or from any Fourth Amendment question.

The petitioner might well have a good defense arising from some rule of Illinois evidentiary or procedural law. In his certiorari petition here, petitioner gives no hint of a willingness to abandon all possible defenses other than the *Chadwick* claim. Petitioner, then, does not come within the holding of *Pope, supra*, in which the Court, despite its concern over the "finality" of the judgment, granted certiorari on the strength of the "explicit and free" concession made by the petitioner in that case that "his case rests upon his federal claim and nothing more," 73 S. Ct., at 751. No similar concession could be read into the instant petition, even assuming that it would be advisable for this Court to attempt to do so.

This Court has said that the test of the "finality" of judgment under 28 U.S.C. 1257 is that the judgment "must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed,' " *Gospel Army* v. *City of Los Angeles*, 331 U.S. 543, 67 S. Ct. 1428, 1430

(1947). The Illinois Supreme Court order that petitioner asks this Court to review, does not fully determine the rights of petitioner and of the State of Illinois, and the Circuit Court of Cook County has far more to do than simply enter a judgment directed by the Illinois Supreme Court: the trial judge must proceed to conduct a trial of the case unless the case can be disposed of by some manner short of trial.

The Illinois Supreme Court's order is, in short, an interlocutory one, and, under Illinois law, "no appeal lies from an interlocutory order in the absence of a statute or rule specifically authorizing such review," *People* v. *Miller,* 35 Ill. 2d 62, 67, 219 N.E. 2d 475, 478 (1966), see *Bulk Terminals Company* v. *Environmental Protection Agency,* 65 Ill. 2d 31, 357 N.E. 2d 430, 433 (1976). Petitioner can point to no Illinois statute or rule authorizing an appeal from an order denying a motion to suppress evidence, for no statute or rule exists. And, as respondent pointed out at the outset, *supra,* at 1, the Illinois Supreme Court's order here is functionally indistinguishable from a trial court order denying a defendant's motion to suppress evidence in any garden-variety narcotics prosecution.

CONCLUSION

Because the order that petitioner asks this Court to review is not a final judgment within the meaning of 28 U.S.C., Sec. 1257, this Court should deny the petition for a writ of certiorari, and respondent accordingly asks that this Court duly deny the petition.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
MELBOURNE A. NOEL, JR.,
Assistant Attorney General,
188 West Randolph Street (Suite 2200),
Chicago, Illinois 60601,
312/793-2570,
Attorneys for Respondent.

THOMAS CONNORS,
Assistant Attorney General,
Of Counsel.